The Government suggests that the Third Circuit did not pass on this issue. The fact that the five dissenting judges so prominently urged a remand demonstrates otherwise. It is not that the majority did not consider the question, it is that the majority did not explain its failure to order a remand in light of what it acknowledged was an impermissible alteration of a date-sensitive court document.

The AEDPA offers Mr. Bendolph one chance at federal *habeas* review. Despite the fact that all of the judges of the *en banc* Third Circuit agreed that something extraordinary happened in this case, something beyond Mr. Bendolph's control, the majority cut off any further examination of the issue even though its own precedent suggests equitable tolling might be appropriate.[17] That result calls for this Court's review.[18]

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[17] *See Seitzinger* v. *Reading Hospital & Medical Center*, 165 F.3d 236, 240-41 (CA3 1999) (equitable tolling appropriate in "extraordinary circumstances"), and *Brown* v. *Shannon*, 322 F.3d 768, 771 (CA3 2003).

[18] Mr. Bendolph has never suggested that this second issue is the subject of a circuit split. It is, instead, an appropriate alternative basis for reversal should the Court accept the first issue for review but for some reason affirm the Third Circuit on that point. *See Pliler* v. *Ford*, 124 S.Ct. 2441, 2448 (2004) (Stevens, J., joined by Souter, J., concurring in the judgment) ("... I am persuaded that the judgment entered by the Court – remanding to the Ninth Circuit to determine the propriety of equitable tolling – is both consistent with those views and correct.").

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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September 6, 2005